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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

ARNOLD I. KRAMER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

SUPPLEMENT TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

GEORGE B. COLLINS
COLLINS & USCIAN
One North LaSalle Street
Chicago, Illinois 60602
(312) 372-7813

Attorney for Petitioner

BEST AVAILABLE COPY

SUPPLEMENTAL QUESTIONS PRESENTED

3. Whether a criminal statute of limitations is jurisdictional or whether it is an affirmative defense that may be waived without the specific, knowing and voluntary waiver of the defendant.

4. Whether a criminal defendant's Sixth Amendment right to effective counsel is violated by his attorney's omission to assert a statute of limitations defense that would absolutely prevent the accused's conviction.

THE PARTIES

The Petitioner is Arnold I. Kramer, the Defendant-Appellant below. The Respondent is the United States of America, the Plaintiff-Appellee below.

TABLE OF CONTENTS

	Page
SUPPLEMENTAL QUESTIONS PRESENTED	vi
THE PARTIES	vii
SUPPLEMENTAL TABLE OF AUTHORITIES	ix
OPINIONS BELOW	12
JURISDICTION	12
STATUTES INVOLVED	12
SUPPLEMENT TO STATEMENT OF THE CASE	12
REASONS FOR GRANTING THE WRIT:	
III.	
A CONFLICT EXISTS BETWEEN THE CIRCUITS OF THE FEDERAL COURTS OF APPEAL ON THE ISSUE OF WHETHER THE STATUTE OF LIMITATIONS IS JURISDICTIONAL OR WHETHER IT IS AN AFFIRMATIVE DEFENSE THAT MAY BE WAIVED	13
IV.	
THE DEFENDANT'S SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WAS DENIED BY HIS TRIAL ATTORNEY'S GROSS ERRORS, OMISSIONS AND NEGLECT	17
CONCLUSION	21

SUPPLEMENTAL TABLE OF AUTHORITIES

Cases

Arrowood v. Clusen, 732 F.2d 1364 (7th Cir. 1984) 20

Askins v. United States, 102 U.S. App. D.C. 198, 251 F.2d 909 (1958) 14

Benes v. United States, 276 F.2d 99 (6th Cir. 1960) 15, 16

Bridges v. United States, 346 U.S. 209, 73 S.Ct. 1055, 97 L.Ed. 1557 15

Chaifetz v. United States, 109 U.S. App. D.C. 349, 288 F.2d 133 (D.C. Cir. 1960) 16

Moore v. State, 43 N.J.L. 203 16

People v. Lee, 356 Ill. 294, 190 N.E. 264 15

People v. Steiger, 154 Misc. 538, 277 N.Y.S. 602 . 15

State v. Bilbao, 38 Idaho 92, 213 P. 1025, 222 P. 785 15

State v. Steensland, 33 Idaho 529, 195 P. 1080 . 15

Strickland v. Washington, 104 S.Ct. 2052 (1984) . 17

United States ex rel. Cosey v. Wolff, 727 F.2d 656 (7th Cir. 1984) 20

United States v. Cronic, 104 S.Ct. 2039 (1984) . 19

United States v. Hankin, 607 F.2d 611 (3rd Cir. 1979) 14

United States v. Meeker, 701 F.2d 685 (7th Cir. 1983) 13

United States v. Sears, Roebuck and Company, 518 F.Supp. 179 (1981) 14

Waters v. United States, 328 F.2d 739 (10th Cir. 1964) 14, 15

Texts

American Bar Association Standards for Criminal Justice, (2d ed. 1980) 18

13 A.L.R. 1446 15

23 C.J.S. Criminal Law § 223, 350-351 15

Wharton, Crim. Proc. 10th ed. § 367, 415 15

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October Term, 1984

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Respondent.

SUPPLEMENT TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, Arnold I. Kramer filed a petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit. The petition was docketed on March 1, 1985 and is still pending. Since the petition was filed it has come to the petitioner's attention that the following special and important reasons exist in this case, bearing on the granting of writ of certiorari, that should be brought to this Court's attention.

OPINIONS BELOW

The opinions below are set forth in Petition, page 2.

JURISDICTION

The jurisdiction of this Court is set forth in Petition, page 2.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provisions and statutes involved are set forth in Petition, page 2.

SUPPLEMENT TO STATEMENT OF THE CASE

Kramer was indicted on four counts, for failing to file income tax returns for the years 1976-1979 and additional count for filling in an "x" in a box on an extension form for the year 1979. All of the income tax returns for the years in question were filed prior to the superceding indictment dated December 19th 1983 and showed that no tax was due in any of the years, because there was a loss

carry forward from previous years (Trial transcript, December 16, 1983, page 16). Kramer was convicted after a bench trial, on all counts and sentenced separately to imprisonment of 1 year on each Count consecutively for a total period of incarceration of 4 years and placed on probation for 5 years thereafter. In addition Kramer was fined $10,000.00 on Count I (Appendix C, pages C-1 to C-2).

REASONS FOR GRANTING THE WRIT

III.

A CONFLICT EXISTS BETWEEN THE CIRCUITS OF THE FEDERAL COURTS OF APPEAL ON THE ISSUE OF WHETHER THE STATUTE OF LIMITATIONS IS JURISDICTIONAL OR WHETHER IT IS AN AFFIRMATIVE DEFENSE THAT MAY BE WAIVED.

In the case at bar the Court of Appeals denied Kramer's claim that the statute of limitations barred his prosecution under Count I of the superceding indictment. The reason given for this denial is that Kramer failed to raise this issue at trial and thus waived his right to the statute of limitations defense on appeal (Appendix A, page A-3). The "waiver" referred to was a result of Kramer's trial attorney's failure to raise the statute of limitations issue at or before trial (Kramer Brief, page 29).

The Court of Appeals cited *United States v. Meeker*, 701 F.2d 685, 687-88 (7th Cir. 1983) in support of its denial of Kramer's claim (Appendix A, page A-3). The *Meeker* case holds that; 1.) the statute of limitations does not pose a jurisdictional bar to prosecution; 2.) the defendant in

a criminal action must affirmatively assert limitations defense and 3.) the purposes of the time bar of the statute of limitations are not offended by a knowing and voluntary waiver of the defense by the defendant.

Meeker and each case cited therein, except the Seventh Circuit cases, is factually different from the case at bar. Every case included a knowing, specific and voluntary waiver of the limitations defense by the defendant. *No such waiver was given by Kramer.* The Court of Appeals implied Kramer's "waiver" from the fact that his trial counsel failed to raise or even mention the limitations defense (Appendix A, page A-3).

The defense of statute of limitations cannot be waived by counsel for the defendant. A waiver to a statutory right to the defense of statute of limitations, *must be made by the client,* voluntarily and understandingly with full knowledge of the right waived. *United States v. Sears, Roebuck and Company,* 518 F.Supp. 179 (1981), rev'd on other grounds.

Although several of the circuits have adopted the view of *Meeker,* if a specific, knowing and voluntary waiver is made by the defendant, other Federal Courts of Appeal have expressed a conflict with the view of the Court of Appeals for the Seventh Circuit as to the statute of limitations defense.

In the case of *United States v. Hankin,* 607 F.2d 611 (3rd Cir. 1979) the court at page 615 said as follows:

> "The statute 'is to be liberally interpreted in favor of the accused.' *Waters v. United States,* 328 F.2d 739, 742 (10th Cir. 1964) As the late Judge Fahy said in *Askins v. United States,* 102 U.S. App. D.C. 198, 201, 251 F.2d 909, 912 (1958) 'society is likely to be healthier on the whole if an individual suspected of

> a noncapital offense is either charged within a specified time . . . or else is relieved of the never ending possibility of public accountability of an accusation arising out of the long ago.' The remedy for failure to bring an action within the statute of limitations is a bar to the right of prosecution." (citations omitted)

In the case of *Waters v. United States*, 328 F.2d 739 (10th Cir. 1964) the court at page 742 said as follows:

> "This statute of limitations, as found in the revenue laws, is in consonance with a policy of repose 'that is fundamental to our society and our criminal law.' *Bridges v. United States*, 346 U.S. 209, 73 S.Ct. 1055, 97 L.Ed. 1557."

The court went on to say at page 743:

> "Unlike the statute of limitations in civil cases, it is not a mere limitation upon the remedy, but a limitation upon the power of the sovereign to act against the accused." (citations omitted)

In the case of *Benes v. United States*, 276 F.2d 99 (6th Cir. 1960) the court at page 108 said as follows:

> "In criminal actions it has been stated that the purpose of statutes of limitations is to afford immunity from punishment, *People v. Steiger*, 154 Misc. 538, 277 N.Y.S. 602, 606, and that such statutes are construed in contradistinction to statutes applicable to civil actions, not as statutes of repose going to the remedy only, but as creating a bar to the right of prosecution. *State v. Bilbao*, 38 Idaho, 92, 213 P. 1025, 222 P. 785; *State v. Steensland*, 33 Idaho 529, 195 P. 1080; 13 A.L.R. 1442; *People v. Lee*, 356 Ill. 294, 190 N.E. 264; 23 C.J.S. Criminal Law § 223, pp. 350-351; 13 A.L.R., Annotation, p. 1446 *et seq.* As stated in *State v. Steensland, supra*:
>
> > 'Statutes of Limitation in criminal cases differ from such statutes in civil cases, in that in, civil

> cases they are statutes of repose, while in criminal cases they create a bar to the prosecution. 1 Wharton, Crim. Proc. 10th ed. § 367, p. 415; *Moore v. State*, 43 N.J.L. 203, 39 Am. Rep. 558, 17 R.C.L. § 56, p. 704.' "

In the case of *Chaifetz v. United States*, 109 U.S. App. D.C. 349, 351-52, 288 F.2d 133, 135-136 (D.C. Cir. 1960), rev'd on other grounds 366 U.S. 209, 81 S.Ct. 1051, 6 L.Ed. 233 (1961) the court stated:

> "As was pointed out by the Court of Appeals for the Sixth Circuit in *Benes v. United States*, 276 F.2d 99 (6th Cir. 1960) [citation inserted] a statute of limitations in a criminal case, unlike such a statute in civil matters, is not merely a statute of repose but creates a bar to prosecution."

The above cases show the existence of a conflict as to the nature of the criminal statute of limitations defense between the Third, Sixth, Tenth, District of Columbia Circuit and the Seventh Circuit.

A resolution of the above conflict is necessary to the case at bar for the following reasons.

A. If the Seventh Circuit's *Meeker* decision applies to the case at bar and in fact Kramer's trial counsel "waived" the defense of statute of limitations, this serious omission by trial counsel denied Kramer of the Sixth Amendment right to effective counsel. The prejudice resulting from such waiver is apparent because the statute of limitations defense would absolutely have prevented Kramer's conviction on Count I which resulted in his being sentenced to 1 year in jail and fined $10,000.00.

B. If the defense of statute of limitations is a jurisdictional bar to prosecution which can only be specifically, voluntarily and understandingly waived by the defen-

dant, and such waiver not having occurred nor supported by the record, Kramer's conviction on Count I should be reversed.

C. Kramer was separately sentenced on Count I to 1 year in jail and fined $10,000.00.

IV.

THE DEFENDANT'S SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WAS DENIED BY HIS TRIAL ATTORNEY'S GROSS ERRORS, OMISSIONS AND NEGLECT.

The Court of Appeals denied Kramer's claim that certain acts and omissions of his trial counsel denied him his sixth amendment right to effective counsel (Appendix A, page A-2). The Court of Appeals cited *Strickland v. Washington*, 52 U.S.L.W. 4565, 4570-1 (U.S. 1984) in support of its denial of Kramer's claim.

In the case of *Strickland v. Washington* cited above, also reported at 104 S.Ct. 2052 the Court at page 2064 said as follows:

> "The benchmark for judging any claim of effectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result."

The Court went on to say at page 2065:

> "Counsel also has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process."

The Court further said on page 2065:

> "In any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel's

assistance was reasonable considering all the circumstances. Prevailing norms of practice as reflected in American Bar Association standards and the like, e.g., ABA Standards for Criminal Justice 4-1.1 to 4-8.6 (2d ed. 1980) ('The Defense Function'), are guides to determining what is reasonable. . . ."

The *American Bar Association Standards for Criminal Justice,* (2d ed. 1980) Standard 4-3.6 page 45 states:

> "(a) Many important rights of the accused can be protected and preserved only by prompt legal action. The lawyer should inform the accused of his or her rights forthwith and take all necessary action to vindicate such rights. The lawyer should consider all procedural steps which in good faith may be taken, including, for example, motions seeking . . . obtaining psychiatric examination of the accused when a need appears, moving for . . . continuance . . . and seeking dismissal of the charges."

Kramer's trial lawyer failed to meet the above standard and the record demonstrates this failure as follows:

1. On December 16, 1983 the transcript of the record at page 18 contains the following:

> "MR. ACKERMAN: He is going to offer testimony to the Court which will get around to the aspect of willfulness and he is plenty crazy, I mean, if you want the truth of the matter. He is going to testify and you may find that he could not be willful, because he could not have had the mental range to do it."

Kramer's trial lawyer failed to present a motion seeking the obtaining of a psychiatric examination, even though he told the court that insanity was an issue in the case.

2. On December 16, 1983 the transcript of the record at page 10 contains the following:

> "MR. ACKERMAN: Incidentally, there is a superceding indictment, I understand, which we have not seen—or a superceding information or a superceding something according to government counsel."

The trial commenced on the next business day, December 19th 1983 and *Kramer's lawyer failed to present a motion for a continuance* so that he could obtain a copy and examine the superceding indictment prior to trial so that he could consider all procedural steps that should have been taken in regard to that indictment.

3. *Kramer's trial lawyer failed to present a motion seeking to dismiss* the charge as to Count I based on the defense of statute of limitations (Appendix A, page A-3). Kramer's lawyer failed to present this defense in spite of the fact that the indictment dated December 9, 1983 charged a crime on which the statute had run June 15, 1983 and had not been tolled. The failure to present this defense prejudiced the defendant. But for this failure Kramer could not have been convicted and sentenced on Count I.

The type of breakdown in the adversarial process that implicates the Sixth Amendment is not limited to counsel's performance as a whole; *specific errors and omissions may be the focus of a claim of ineffective assistance as well.* The right to effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial. *United States v. Cronic,* 104 S.Ct. 2039 (1984).

The totality of Kramer's trial lawyer's errors, acts and omissions, which were not limited to those recited, fall below those standards of reasonable professional conduct which when coupled with the clear prejudice to Kramer, satisfy the requirements of *Strickland* and *United States*

v. Cronic cited above to establish Kramer's claim that his Sixth Amendment rights were violated by ineffective counsel.

In the case of *Arrowood v. Clusen*, 732 F.2d 1364 (1984) cited by the Court of Appeals (Appendix A, page 2) the court at page 1369 said:

> "In its most recent pronouncement on the issue of prejudice, this court has indicated that, to establish ineffective assistance, the defendant need only show that the trial counsel's acts or omissions 'may have impaired the defense.' *United States ex rel. Cosey v. Wolff*, 727 F.2d 656, 658-59 (7th Cir. 1984) Once such a showing has been made it is the government's burden 'to prove beyond a reasonable doubt that the trial counsel's ineffective assistance did not affect the verdict.' *Id.* The question is whether the defendant would have been found guilty if his original trial counsel had performed competently. *Id.* at 659."

In applying the rule of the above case, to the case at bar, Kramer's trial lawyer's failure to raise the statute of limitations "may have impaired the defense". The Court of Appeals has said the failure to raise the issue waived the defense (Appendix A, page A-3). It is impossible to characterize this failure as "trial strategy". The prejudice to Kramer is further shown by the fact that the raising of the defense of statute of limitations would absolutely have prevented Kramer's conviction on Count I which resulted in his being separately sentenced to a consecutive 1 year in jail and fined $10,000.00.

CONCLUSION

For the above reasons and those set forth in original petition, Petitioner respectfully prays that the writ of certiorari issue to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

GEORGE B. COLLINS
COLLINS & USCIAN
One North LaSalle Street
Chicago, Illinois 60602
(312) 372-7813

Attorney for Petitioner